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CHARLES ELMORE

Supreme Court of the United States

OCTOBER TERM, 1936.

No. 469.

WASHINGTON, VIRGINIA AND MARYLAND COACH COMPANY,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

MOTION OF PENNSYLVANIA GREYHOUND LINES, INC., AND GREYHOUND MANAGEMENT COMPANY FOR LEAVE TO FILE BRIEF AS AMICI CURIAE, AND BRIEF OF AMICI CURIAE.

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MOTION FOR LEAVE TO FILE BRIEF AS AMICI CURIAE.

May it please the Court:

The undersigned, as counsel for Pennsylvania Greyhound Lines, Inc., and Greyhound Management Company respectfully move this Honorable Court for leave to file the accompanying brief in this case as *amici curiae.*

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WASHINGTON, VIRGINIA AND MARYLAND COACH COMPANY,
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NATIONAL LABOR RELATIONS BOARD,
Respondent.

BRIEF OF PENNSYLVANIA GREYHOUND LINES, INC., AND GREYHOUND MANAGEMENT COMPANY AS AMICI CURIAE.

This cause seeks a review and reversal of the decision of the Circuit Court of Appeals of the Fourth Circuit, rendered October 6, 1936 (85 F. (2d) 990), which sustained an order of the National Labor Relations Board, ostensibly made in accordance with the Act of Congress of July 5, 1935, known as the National Labor Relations Act.

The present brief will address itself in the main to the constitutionality of the Act, omitting the discussion of features dealing exclusively with the controverted facts of the particular case.

With reference to the latter, however, it may be stated that nothing more than the most cursory review of the present record is required to demonstrate the arbitrary powers inherent in the administrative features of the Act. In fact, the instant case provides a typical illustration of certain of the features in which the validity of the Act is questioned in the later argument.

SYNOPSIS OF ARGUMENT

I.

STATEMENT.

Enumeration of ground upon which constitutionality of National Labor Relations Act is challenged.

II.

The Act is not within the Commerce Clause and violative of the Tenth Amendment.

(a) Act aimed at regimentation of country's industry as a whole with regulatory control vested in National Government.

Schechter Poultry Corp. vs. United States, 295 U. S. 495.

United States vs. Butler, et al., 297 U. S. 1.

Rickert Rice Mills, Inc. vs. Fontenot, 297 U. S. 110.

(1) Reports of Committees of House of Representatives and Senate on Act.

Senate Report 573 (74th Congress, 1st Sess.), pp. 18, 19.

House Report 1147 (74th Congress, 1st Sess.), pp. 3, 4.

(2) Cases relied on by Government distinguished.

Swift vs. United States, 196 U. S. 375.

Stafford vs. Wallace, 258 U. S. 495.

(b) Act an experiment in socialization of industry as contradistinguished from a regulation of commerce.

(1) Broadly stated regulations of relation between capital and labor are subjects of local cognizance.

(2) Except in limited field of its delegated powers Congress may not assume power last stated without violation of Tenth Amendment.

(3) Provision of Act indispensable to accomplishment of obvious purpose confirmatory of violation of Constitution last stated.

Retirement Board vs. Alton R. R. Co., 295 U. S. 330, 374.

Adair vs. United States, 208 U. S. 161, 178.

III.

The Act violative of the Fifth Amendment.

(a) Correspondence of limitation imposed by Fifth and Fourteenth Amendments.

Louisville Bank vs. Radford, 295 U. S. 555.

Retirement Board vs. Alton R. R. Co., 295 U. S. 330.

(b) Right and liberty of contract under Fifth Amendment.

Allgeyer vs. Louisiana, 165 U. S. 578.

Adkins vs. Children's Hospital, 261 U. S. 525.

Adair vs. United States, 208 U. S. 161.

Coppage vs. Kansas, 236 U. S. 1.

Hitchman vs. Mitchell, 245 U. S. 229.

(c) Application of principles of cases last cited demonstrates unconstitutionality of Act.

(d) *Texas & N. O. R. Co. vs. Brotherhood*, 281 U. S. 548, distinguished.

(e) Provisions of Transportation Act provide no justification or support for unconstitutional provision of Labor Relations Act.

(f) Erroneous assumption by administrative representatives of Government that "organized labor" and "collective bargaining" are of identical import.

(g) Case presently before court presented no question of collective bargaining.

(h) Only question here presented constitutional right to hire and discharge.

IV.

The Act violative of Fifth Amendment.

(a) Constitutes an unlawful delegation of legislative authority.

(b) Provisions of Act unfair, unreasonable and oppressive.

(c) Review of Act's provisions.

(d) Review of applicable decisions.

Hitchman vs. Mitchell, 245 U. S. 229, 250-251.
Carter vs. Carter Coal Co., 298 U. S. 238, 310.

V.

Act violative of Article 3, Section 1, of the Constitution and of the Seventh Amendment.

(a) Labor Board vested with judicial powers.

(b) Powers granted impinge judicial power of courts.

(c) Judicial powers vested in Board not essentially dif-

ferent from powers of court of equity respecting mandatory injunctions.

(d) Powers to cause reinstatement of discharged employee with back pay are exercise of common law judicial powers.

(e) Matters last stated contravene law of Seventh Amendment in denying trial by jury.

VI.

Act not aided by application of severability clause.

(a) Constitutes a code, none of the provisions of which may be eliminated without destroying legislative plan.

(b) The provisions regulating relations of employers and employees with the prescribed administrative institution the crux of the Act's scheme without which it would be purposeless.

Carter vs. Carter Coal Co., supra.

The Employer's Liability Cases, 207 U. S. 463.

I.

STATEMENT.

For preliminary purposes it may be stated the National Labor Relations Act is indicted upon a variety of counts amongst which the following may be summarily enumerated, viz.:

1. It is nothing more than an incident or part of a legislative policy aimed at the regimentation of the industry of the country as a whole, with the centralization of con-

trol in the National Government, thus violating the Tenth Amendment.

2. While ostensibly characterized as a regulation of commerce, the characterization arises to little more than an adroitly worded pretense, failing to conceal the underlying purpose of the complete socialization of industry, similarly violating the Amendment last stated.

3. The Act, in various particulars indispensable to the consummation of its obvious purposes, is violative of the Fifth Amendment, in that it denies the right of freedom of contract—the right of the employer to hire and discharge and the correlative right of the employee to work or refuse to work for whomsoever he pleases.

4. Assuming argumentatively, the Act is susceptible of characterization as a regulation of commerce, its essential and indispensable provisions are arbitrary, oppressive and unreasonable, viz.:

(a) in the pronouncements of unfair labor practices;

(b) in proscribing what is ordinarily termed the "company union";

(c) in denying the right of the "open" while permitting the enforcement against unwilling employees of the "closed" shop;

(d) the compulsory acceptance by minority employees of conditions of employment imposed by majority without the former's consent;

(e) in unlawfully delegating legislative powers;

(f) in conferring on the Labor Board created by its terms, the power of prescribing various arbitrary administrative regulations;

(g) in imposing on the employer all of the oppressive obligations prescribed by its terms while wholly omitting the imposition of any obligation whatsoever on the employees;

(h) in subjecting the employer to the administrative supervision of a super-authority, the exercise of whose functions necessarily subvert the loyalty and destroy the morale of the employees.

5. The Act unlawfully delegates to the Labor Board judicial power in so far as it confers authority to order the reinstatement of discharged employees with back pay, thus denying the right of trial by jury under the Seventh Amendment.

The various grounds thus alluded to will be considered in more detail in the following argument.

II.

The National Labor Relations Act Is Not Within the Commerce Clause of the Constitution and Is Violative of the Tenth Amendment.

The general subject thus indicated presents a dual inquiry calling for separate consideration.

(a) The Act is aimed at the regimentation of the industry of the country as a whole. Fundamentally, the subject thus suggested involves principles which have already been authoritatively determined by the decisions of this Court.

Schechter Poultry Corp. vs. United States, 295 U. S. 495.

United States vs. Butler, et al., 297 U. S. 1.

Rickert Rice Mills, Inc. vs. Fontenot, 297 U. S. 110.

That one of its main objective purposes was that stated in this subdivision is attested by the history of the enactment as well as the express policy indicated in the statement of such policy set forth in its first section.

The history of the Act requires no detailed comment. Broadly stated it was part of a newly conceived general policy assumed to provide a panacea for the financial and industrial ills which confronted the nation at the time. The policy indicated was manifested in a series of enactments obviously aimed at the regimentation of all industry and the centralization of dictatorial power in the National Government. As many of these contemporary enactments have already been considered by this Court, a detailed review thereof is not required.

In Section 1 of the Act under the heading "Findings and Declaration of Policy," we find the following:

> "The denial by employers of the right of employees to organize and the refusal by employers to accept the procedure of collective bargaining lead to strikes and other forms of industrial strife or unrest, which have the intent or the necessary effect of burdening or obstructing commerce by (a) impairing the efficiency, safety, or operating of the instrumentalities of commerce; (b) occurring in the current of commerce; (c) materially affecting, restraining, or controlling the flow of raw materials or manufactured or processed goods from or into the channels of commerce, or the prices of such materials or goods in commerce; or (d) causing diminution of employment and wages in such volume as substantially to impair or disrupt the market for goods flowing from or into the channels of commerce.
>
> The inequality of bargaining power between employees who do not possess full freedom of association

or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of competitive wage rates and working conditions within and between industries."

The language thus quoted would seem to remove the subject from the realm of serious controversy. While not conclusive, the reports of the conference committees to the respective branches of Congress are, at least confirmatory of the broad scope of the all embracing purposes indicated in the foregoing quotation. In the report of the conference committee to the Senate (S. R. No. 573, May 2, 1935), the following statements appear:

"But the Federal Government has power to prevent burdens upon interstate commerce that reach beyond the intent of those laws in regard to labor disputes, and it is intended in this bill to exercise the full constitutional power of Congress to prevent the described unfair labor practices, which have no extenuating social values operating in their favor." (p. 18.)

"In the case of *Appalachian Coals, Inc. vs. United States* (288 U. S. 344), Chief Justice Hughes wrote: 'The interests of producers and consumers are interlinked. When industry is grievously hurt, when producing concerns fall, when unemployment mounts, and communities dependent upon profitable production are prostrated, the wells of commerce go dry.' This statement is a landmark of contemporary realism in regard to the commerce power. While this bill of course does

not intend to go beyond the constitutional power of Congress, as that power may be marked out by the courts, it seeks the full limit of that power in preventing these unfair labor practices. It seeks to prevent them, whether they burden interstate commerce by causing strikes, or by occurring in the stream of interstate commerce, or by overturning the balance of economic forces upon which the full flow of commerce depends." (p. 19.)

If further confirmation were required with respect to the intentions of the framers of this legislation, it is sufficiently attested by the course pursued following the enactment, by those charged with the responsibility for its enforcement. It would unduly extend the present brief to enter upon this subject in detail. It will suffice to state that the administrative organization provided by the Act's terms has assumed jurisdiction over local industries in a relatively large number of cases, many of which have come before the various Circuit Courts of Appeals. In attempting to sustain the jurisdiction in these cases, the representatives of the Government have had recourse to the stereotyped argument that whatever conditions are calculated to restrict the flow of commerce in its ordinary channels, or lessen the volume of that commerce, have been brought by the Act's terms under Federal jurisdiction, wholly regardless of the fact that the conditions challenged are incidents of strictly local industry, whose only effects on commerce are indirect and remote.

In the light of the considerations thus indicated, it is relatively clear that the enactment in question, by invoking a novel economic concept, was intended to extend Federal control to embrace all industry. In the attempt to sus-

tain this concept, reliance has been placed on the Stockyards and Packers Acts, the Grain Futures Act and other legislation of cognate character. If regard be had, however, to the class of cases of which *Swift vs. United States,* 196 U. S. 375, and *Stafford vs. Wallace,* 258 U. S. 495, are examples, it will be found that in their essential features they are *sui generis* and in no wise calculated to sustain the broadly asserted economic concept implicit in the terms of the present Act.

As still further confirmatory of the scope of the Act, allusion may be made to the fact it was admittedly an amplification of the terms of Section 7 (a) of the National Industrial Recovery Act, as supplemented by Public Resolution No. 44 (see House Report No. 1147, June 10, 1935, pp. 3, 4).

Tested in the light of these considerations, and applying the principles announced by this Court in determining the unconstitutionality of contemporary legislation of largely similar import, the Act here in question has clearly exceeded established constitutional limitations and is invalid accordingly.

The feature of severability of the Act's terms will be considered at a later point in the present brief.

(b) The Act is an experiment in the socialization of industry and is not and was not intended as a regulation of commerce, and is violative of the Tenth Amendment.

While the constitutionality of this Act is challenged on various grounds to be later considered, it is desired to preface the review of these special features by directing attention to the Act as a whole.

Its history is a matter of common knowledge. For years the great labor organizations of the country have concentrated their efforts on various schemes of legislation, all

of which have had the common purpose of making the industry of the country, to all practical intents and purposes, subservient to their demands. This has manifested itself in almost innumerable acts of legislation of both state and national character. It has similarly been reflected in the long series of decisions of our courts.

If it is reasonably apparent from the nature and terms of the Act, that while ostensibly aimed at the regulation of commerce, its real objective was something wholly separate and distinct from such regulation, it cannot be sustained as a constitutional enactment. The circumstance that the application of its provisions or the observance of its requirements may indirectly or remotely affect such commerce, would not sustain its legality under principles firmly established. It remains then to ascertain from the terms of the Act itself its real objective. In reaching the conclusion in this latter regard mere verbiage is not controlling if it is reasonably apparent that such verbiage had no other aim than the concealment of the real purpose of the enactment.

The subject of vital concern addresses itself to determining whether the Act of Congress in question is a mere recrudescence of efforts addressed at the accomplishment of a social or economic objective as contradistinguished from one immediately concerned with the regulation of interstate commerce.

In this field it may be broadly asserted without fear of serious contradiction that the general subject of the social and economic relations between capital and labor is one which addresses itself primarily to the jurisdiction of the states and that this jurisdiction may not be impinged by Congress without violating the provisions of the Tenth Amendment, excepting in the limited field of its delegated authority. That this is what has been attempted in the pres-

ent Act is quite clearly deducible from its terms.

It is emphasized by a variety of the Act's provisions to be later considered, which constitute indispensable and essential incidents of the entire scheme and without which that scheme would fail of consummation. While disguised under the alluring term of "collective bargaining," the real purpose regarded from a purely practical standpoint is the control of industry by organized labor.

In demonstration of what is thus stated it is only necessary to allude to a few of the more salient features of the Act's terms. According to its mandates, collective bargaining is to be made effective through the imposition of an arbitrarily imposed majority rule, wholly regardless of the nature or character of the undertaking or industry affected. The devious potentialities of the imposition need not be considered at this point. In the application of this mandatory requirement the minority of the employees, as well as any group of employees, are deprived of participation or representation with respect to matters in which their interests are immediately involved.

The rights of the employer are similarly disregarded in the circumstance that he is denied the privilege of voluntary bargaining with the minority employees, although the Act's terms begrudgingly extend him the privilege of hearing their grievances (Sec. 9 (a)).

The framers of the Act, apparently conceiving the impregnable status of labor unions, had as their ultimate aim the driving of all employees into the fold of such organization or as the alternative, wholly denying them any right of representation respecting the details of their relations with their employer or of their employment. As an incident of the entire scheme a so-termed National Labor Relations Board was created with powers and jurisdiction of

autocratic, if not positively despotic control. The details of this jurisdiction may for the moment be postponed. Summarized, its functions are addressed at regimenting employees in a collective bargaining unit; in vesting that unit with the sole bargaining power and forcing the exclusive recognition of this unit on the employer.

As elements in the scheme's effectuation are the restraints put upon an employee association and the latter's encouragement or support by the employer by Section 8 (2). In contrast with this is the provision of Section 8 (3), that where any labor organization, vested with the representative bargaining status, has been organized without the employer's influence or aid, no violation of the Act's terms shall result *if the employer, with the consent of the organization, shall force the minority to become members of the majority unit as a condition of their continued employment.*

Without adverting further to the specific provisions of the Act the matters thus far considered should demonstrate its main objective, which is not even adroitly concealed.

The paramount and controlling question, therefore, is whether the Act may be characterized as a regulation of commerce or as one primarily aimed at a social or economic experiment.

If it be argumentatively conceded that what is termed "collective bargaining" is a panacea for labor disputes which may interfere with the normal flow of interstate commerce, the inquiry immediately propounds itself whether in the present Act, such right has not been invoked and employed for purposes wholly foreign to any true conception of its implications.

While the whole thesis of the Act premises the avoidance of labor disputes for their tendency to interfere with the free and unobstructed flow of commerce, it will be noted

that Section 13 of the Act expressly recognizes the right of employees to strike. Taking the Act by its four corners, the conclusion is seemingly inescapable that its poorly concealed purpose was that of strengthening the power of the country's great labor organizations; that it addressed itself to the consummation of a plan conceived to render industry subservient to such labor organizations and thus to accomplish a much sought for innovation in the country's existing industrial system.

Looking through form to substance, the Act from the standpoint of a regulation of commerce, is little more than a poorly disguised pretense. An analysis of its terms leads to the conviction that it must be brought within the principles announced in *Retirement Board vs. Alton R. R. Co.*, 295 U. S. 330, 374, in which the following was stated:

> "We feel bound to hold that a pension plan thus imposed is in no proper sense a regulation of the activity of interstate transportation. It is an attempt for social ends to impose by sheer fiat non-contractual incidents upon the relation of employer and employee, not as a rule or regulation of commerce and transportation between the States, but as a means of assuring a particular class of employees against old age dependency. This is neither a necessary nor an appropriate rule or regulation affecting the due fulfillment of the railroads' duty to serve the public in interstate transportation."

In concluding the subject thus considered, we cannot do better than quote the following excerpt from the opinion of this Court in *Adair vs. United States*, 208 U. S. 161, 178:

> "Manifestly, any rule prescribed for the conduct of interstate commerce, in order to be within the competency of Congress under its power to regulate com-

merce among the States, must have some real or substantial relation to or connection with the commerce regulated. But what possible legal or logical connection is there between an employe's membership in a labor organization and the carrying on of interstate commerce? Such relation to a labor organization cannot have, *in itself* and in the eye of the law, any bearing upon the commerce with which the employe is connected by his labor and services. Labor associations, we assume, are organized for the general purpose of improving or bettering the conditions and conserving the interests of its members as wage-earners—an object entirely legitimate and to be commended rather than condemned. But surely those associations as labor organizations have nothing to do with interstate commerce as such. One who engages in the service of an interstate carrier will, it must be assumed, faithfully perform his duty, whether he be a member or not a member of a labor organization. His fitness for the position in which he labors and his diligence in the discharge of his duties cannot in law or sound reason depend in any degree upon his being or not being a member of a labor organization. It cannot be assumed that his fitness is assured, or his diligence increased, by such membership, or that he is less fit or less diligent because of his not being a member of such an organization. It is the employe as a man and not as a member of a labor organization who labors in the service of an interstate carrier. Will it be said that the provision in question had its origin in the apprehension, on the part of Congress, that if it did not show more consideration for members of labor organizations than for wage-earners who were not members of such organizations, or if it

did not insert in the statute some such provision as the one here in question, members of labor organizations would, by illegal or violent measures, interrupt or impair the freedom of commerce among the States? We will not indulge in any such conjectures, nor make them, in whole or in part, the basis of our decision. We could not do so consistently with the respect due to a coordinate department of the Government. We could not do so without imputing to Congress the purpose to accord to one class of wage-earners privileges withheld from another class of wage-earners engaged, it may be, in the same kind of labor and serving the same employer. Nor will we assume, in our consideration of this case, that members of labor organizations will, in any considerable numbers, resort to illegal methods for accomplishing any particular object they have in view.

Looking alone at the words of the statute for the purpose of ascertaining its scope and effect, and of determining its validity, we hold that there is no such connection between interstate commerce and membership in a labor organization as to authorize Congress to make it a crime against the United States for an agent of an interstate carrier to discharge an employe because of such membership on his part. If such a power exists in Congress it is difficult to perceive why it might not, by absolute regulation, require interstate carriers, under penalties, to employ in the conduct of its interstate business *only* members of labor organizations, or *only* those who are *not* members of such organizations—a power which could not be recognized as existing under the Constitution of the United States."

For the reasons thus stated the Act cannot be assigned to

an exercise of the power delegated to Congress under the commerce clause of the Constitution. As a social and economic experiment, it violates the provisions of the Tenth Amendment.

III.

The Act Is Violative of the Provisions of the Fifth Amendment.

Postponing for the moment specific features of the Act which will call for later consideration, it is desired to approach the subject indicated in the caption from a broader standpoint.

The limitations on Congressional power imposed by the Fifth Amendment are essentially the same as those imposed on the states by the Fourteenth Amendment.

Louisville Bank vs. Radford, 295 U. S. 555.

Retirement Board vs. Alton R. R. Co., 295 U. S. 330.

Implicit in the Amendment's terms is the right of liberty of contract.

Allgeyer vs. Louisiana, 165 U. S. 578.

It is true it was held in substance, in *Adkins vs. Children's Hospital,* 261 U. S. 525, that there was no such thing as absolute liberty of contract; that under certain circumstances the privilege of contract must yield to the public welfare, but notwithstanding, the right was the rule while the limitation on its exercise was the exception. With respect to conditions, in many respects similar to the subject-matter of the Act here involved, it was held that legislation restraining the liberty of contract was unconstitutional.

Adair vs. United States, 208 U. S. 161.

Coppage vs. Kansas, 236 U. S. 1.

Hitchman vs. Mitchell, 245 U. S. 229.

The application of the principles announced in the cases last cited clearly establishes the unconstitutionality of the Act in question. Other cases attesting the same result will call for consideration at a later point in the present argument.

In the relatively large number of proceedings inaugurated by the Government in the attempted enforcement of this Act, it has been broadly asserted that the question of its constitutionality is foreclosed by the decision in *Texas & N. O. R. Co. vs. Brotherhood*, 281 U. S. 548. The contention in this regard has been sustained in certain of the decisions rendered by the lower courts. Nothing more than the most cursory consideration of the statute involved and the issues presented in the case cited is seemingly required to demonstrate that the claim with respect to its finality in the instant case, is wholly untenable. The case arose under the 1926 Amendment to the Railroad Act. (44 Stat. Ch. 347, p. 577.) It had its inception in a Bill in Equity filed by the respondent in the District Court to enjoin petitioner from certain acts asserted to have been inaugurated by petitioner in an attempt to coerce its employees and prevent their exercise of rights prescribed by the statute's terms. On preliminary hearing the Court determined the provisions of the statute had been violated and granted a temporary injunction restraining the petitioner from the continuance of such violation. The terms of the injunction order having been disregarded, contempt proceedings were instituted with the result of petitioner's being ordered to purge itself of the contempt or be subjected to a fine.

The terms of the order last mentioned were carried into the final decree. On appeal to the Circuit Court of Appeals, the decree was affirmed, and the cause thereupon brought to

this Court for review upon certiorari. The suit invoked rights asserted under Section 2 (3) of the Act as follows:

> "Representatives, for the purposes of this Act, shall be designated by the respective parties in such manner as may be provided in their corporate organization or unincorporated association, or by other means of collective action, without interference, influence, or coercion exercised by either party over the self-organization or designation of representatives by the other."

Briefly stated, the facts disclose that respondent had been designated by the employees of petitioner as the latter's representative; that it had been recognized in its representative capacity in pending negotiations involving various phases of the working conditions; that negotiations had proven unavailing and the offices of the Mediation Board prescribed by the Act had been invoked. Pending the decision of the last named tribunal it was shown that petitioner had, in various ways, attempted to nullify the efforts of the Brotherhood by coercive measures intended to compel withdrawal from that organization, promote membership in what for brevity may be termed a company union and to recognize exclusively the latter as the sole bargaining agency for the employees. Incidental to the accomplishment of the purpose last indicated it was shown that petitioner had discharged various of its employees by reason of their affiliation with the Brotherhood.

In the situation thus indicated, it was held by this Court that the case did not present the right of an employer to hire or discharge and in consequence that the principles announced in *Adair vs. United States* and *Coppage vs. Kansas, supra;* were inapplicable. An examination of the brief filed by counsel for the Brotherhood in this Court discloses that

what was held by the Court as above indicated, conformed to their contention.

The decision of the Court, apart from the feature already mentioned, was rested on the propositions that (1) the right of collective bargaining was an inherent constitutional right on the part of the railroad employees independent of the sanction in the statute's terms; (2) the recognition of this privilege by the statute violated no constitutional rights of the employer; and (3) the prevention of labor disputes in transportation was within the regulatory power of Congress under the commerce clause. Aside from the matters thus indicated, it was held that where rights were sanctioned by the mandate of Congress, appropriate relief against the violation of those rights might be invoked at the hands of the courts. The recognition of the rights thus mentioned with the express qualification that the issue was not concerned with the constitutional right of the employer to hire or discharge, clearly discloses that the case turned on the facts establishing what for brevity we may term fraud, coercion or undue influence in the selection of representatives for collective bargaining purposes.

Before leaving this branch of the case, argument is hardly required to demonstrate that the provisions of the Transportation Act, as already quoted are entirely dissimilar to those here involved and the determination of the constitutionality of the former has relatively little bearing in determining the validity of the present Act.

If it be assumed that the decision in the Texas case forecloses inquiry with respect to the regulatory power of Congress in certain aspects of the relation between employer and employee in interstate commerce, it by no means follows that the exercise of that authority is unlimited and may

transcend all constitutional limitations. If it further be assumed that the power being conceded, the means for its effectuation are to be determined in the exercise of legislative discretion, it must not be overlooked that the exceptions to the principle are as well established as the principle itself. These last will be later considered in the present argument.

The basic and, to our minds, fundamental error upon the part of the Labor Board as well as the Government counsel in the administration of the present Act, appears in the gratuitous assumption that the terms, "labor organization" and "collective bargaining," are synonymous. In other words, concretely expressed, if an employer, confronted with the presence of one or more labor agitators, whose proclivities are too generally known and understood to require detailed comment, honestly, and with no ulterior purpose beyond that of avoiding trouble, discharges the parties fomenting the agitation, his action is at once challenged as an unfair labor practice and an interference with collective bargaining even though no question of collective bargaining is in controversy. So far as our observations have extended, this has been the situation presented in many of the cases brought before the Board in which the results have been uniformly foreordained.

In concluding on the broader phases of the constitutional question, it is contended that in a situation such as that presented in the instant case, no question of collective bargaining is presented; that the resultant action of the Labor Board as sustained by the Court in the decision under review is without ground or basis so far as collective bargaining is concerned and that the only substantive claim which can be spelled from the record must be rested on the discharge of an employee on the ground of union affiliations. The constitutional right in this regard is attested by the

Adair, Coppage and Hitchman cases, *supra*, which have never been overruled.

IV.

THE ACT IS VIOLATIVE OF THE FIFTH AMENDMENT. IN ITS ESSENTIAL PROVISIONS IT CONSTITUTES AN UNLAWFUL DELEGATION OF LEGISLATIVE AUTHORITY. ITS PROVISIONS ARE UNFAIR, UNREASONABLE AND OPPRESSIVE.

As the subjects thus indicated are in many respects closely related, and have received common consideration in many of the cases, they will be here treated together.

In approaching their consideration a brief excerpt from the opinion of the Court in the Adair case, *supra*, will elucidate the general principle involved.

> "While, as already suggested, the rights of liberty and property guaranteed by the Constitution against deprivation without due process of law, is subject to such reasonable restraints as the common good or the general welfare may require, it is not within the functions of government—at least in the absence of contract between the parties—to compel any person in the course of his business and against his will to accept or retain the personal services of another, or to compel any person, against his will, to perform personal services for another. The right of a person to sell his labor upon such terms as he deems proper is, in its essence, the same as the right of the purchaser of labor to prescribe the conditions upon which he will accept such labor from the person offering to sell it. So the right of the employe to quit the service of the employer, for whatever reason, is the same as the right of the employer, for whatever reason, to dispense with the services of such em-

ploye. It was the legal right of the defendant Adair—however unwise such a course might have been—to discharge Coppage because of his being a member of a labor organization, as it was the legal right of Coppage, if he saw fit to do so—however unwise such a course on his part might have been—to quit the service in which he was engaged, because the defendant employed some persons who were not members of a labor organization. In all such particulars the employer and the employe have equality of right, and any legislation that disturbs that equality is an arbitrary interference with the liberty of contract which no government can legally justify in a free land." (page 174.)

In determining the validity of the present Act from the standpoint of the objections indicated in the caption of this subdivision, reference may be made to a number of its special provisions which constitute indispensable parts of the legislative scheme.

Section 1 of the Act, as already noted, is the recital of its broad objective purposes. Section 2 defines various of the terms of the Act. Sections 3, 4 and 5 create the Labor Board, prescribe the terms of office of the members and other details which need not be reviewed. Section 6 reads as follows:

"The Board shall have authority from time to time to make, amend, and rescind such rules and regulations as may be necessary to carry out the provisions of this Act. Such rules and regulations shall be effective upon publication in the manner which the Board shall prescribe."

This is a clear delegation of legislative authority without prescribing standards for its exercise.

Compare: *Schechter vs. United States, supra.*

Section 7 covers the right of organization by employees for the purpose of collective bargaining and other purposes connected with their employment.

Section 8 prescribes what shall constitute "unfair labor practices." These last are enumerated in a series of sub-paragraphs which call for separate consideration. Sub-section (1) provides that it shall be unlawful to "interfere with, restrain or coerce" employees in the exercise of the rights expressed in Section 7. Sub-section (2) is as follows:

> "To dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: *Provided*, That subject to rules and regulations made and published by the Board pursuant to section 6 (a), an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay."

It is self-evident the provisions thus quoted were intended to limit and restrict the exercise of ordinary constitutional rights on the part of both employers and employees. It is too clear for argument that the objective was the destruction of what for brevity may be termed the "company union" and thus inserting the opening wedge for the accomplishment of the broader purpose considered at an earlier point in this brief. The concession indicated in the proviso borders on the ludicrous and would not call for serious consideration were it not for the fact of demonstrating the motives underlying the entire scheme promulgated by the Act's terms. The question immediately propounds itself as to what constitutional power the imposition of any such limitation on the freedom of employers and employees may be assigned? It is a well known fact, of which the Court may take judicial cognizance, that the system of what we have termed com-

pany unions, has existed in many branches of industry for years. It is also equally well known that such unions have provided targets for the attacks of labor organizations. We are not here concerned with the charges and counter-charges of the controversy between the conflicting interests. The sole question, from the constitutional standpoint, addresses itself to determining what has already been indicated, viz., to what constitutional provision, authority of Congress to arbitrarily deny to employers the right of encouraging company unions and the corresponding right of the employees to become members of such unions may be ascribed.

While not strictly germane to the present argument, we have no hesitation in stating that the Labor Board, in repeated instances, has condemned company unions on the assumption of what has been gratuitously assumed as their tendency to impede collective bargaining. This has manifested itself in instances where collective bargaining was not involved; where the facts have disclosed nothing more than an attempt by labor agitators to inject themselves into an industry and the obvious purpose of the actors was to foment trouble and discontent.

The features last mentioned apart, however, it is asserted that the provisions of Sec. 8, Sub-section (2) constitute nothing more than an attempted arbitrary restriction on the liberties of both employers and employees and must be condemned accordingly.

Sub-section (3) is as follows:

> "By discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided*, That nothing in this Act, or in the National Industrial Recovery Act (U. S. C., Supp. VII,

title 15, secs. 701-702), as amended from time to time, or in any code or agreement approved or prescribed thereunder, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this Act as an unfair labor practice) to require as a condition of employment membership therein, if such labor organization is the representative of the employees as provided in section 9 (a), in the appropriate collective bargaining unit covered by such agreement when made."

Inherent in this language is a double-barreled attack on the privileges and liberties of both employers and employees. The first words of the provision indicate it was intended to absolutely deny to employers the right to hire and discharge at will if the motive for such action was found in discrimination against an employee for affiliation with a labor organization. As the law now stands it must be conceded that such action is within the employer's constitutional rights with the single exception arising under the peculiar state of facts such as those presented in the Texas & N. O. R. Co. case, *supra*.

The second barrel in the attack on constitutional rights implicit in the language of the subdivision appears in the proviso. Summarized, this language means nothing less than an attempted authorization of the closed shop. If we may be pardoned for paraphrasing the language indicated, it means nothing more than that the employer, *with the consent of a labor organization*, may impose the requirement of membership in such an organization on his employees as a condition of their continued service. In short, the employer with the consent of the organization, may restrict the privi-

leges of his employees in respects otherwise condemned by the Act's terms.

In considering the effect of these provisions reference may be made to the language of the Court in *Hitchman v. Mitchell*, 245 U. S. 229, 250-251, in which it was stated as follows:

> "That the plaintiff was acting within its lawful rights in employing its men only upon terms of continuing non-membership in the United Mine Workers of America is not open to question. Plaintiff's repeated costly experiences of strikes and other interferences while attempting to 'run union' were a sufficient explanation of its resolve to run 'non-union,' if any were needed. But neither explanation nor justification is needed. Whatever may be the advantages of 'collective bargaining,' it is not bargaining at all, in any just sense, unless it is voluntary on both sides. The same liberty which enables men to form unions, and through the union to enter into agreements with employers willing to agree, entitles other men to remain independent of the union and other employers to agree with them to employ no man who owes any allegiance or obligation to the union. In the latter case, as in the former, the parties are entitled to be protected by the law in the enjoyment of the benefits of any lawful agreement they may make. This court repeatedly has held that the employer is as free to make non-membership in a union a condition of employment, as the working man is free to join the union, and that this is a part of the constitutional rights of personal liberty and private property, not to be taken away even by legislation, unless through some proper exercise of the paramount police power."

The potentiality of these provisions immediately suggests

that what is termed a "consent" therein may, and likely will be translated into a demand, compliance with which on the part of the employer may be made compulsory.

Sub-section (4) denies the right of the employer to discharge an employee for filing charges or testifying in a proceeding instituted under the Act's terms.

Sub-section (5) prescribes in substance, that refusal to bargain collectively shall constitute an unfair labor practice under the Act's terms.

Here again the potentialities for the fomenting of trouble and discord involving as they do the arbitrary discretionary powers of the Labor Board, readily suggest themselves without the necessity of detailed argument.

Section 9 (a) provides as follows:

> "Representatives designated or selected for the purpose of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: *Provided,* that any individual employee or a group of employees shall have the right at any time to present grievances to their employer."

In principle no satisfactory distinction can be found between the provisions thus quoted and those appearing in what is popularly known as the Guffey Coal Act, considered by this Court in the case of *Carter vs. Carter Coal Co.,* 298 U. S. 238. In dealing with the labor provisions of the Act there in question, the Court stated as follows:

> "That subdivision delegates the power to fix maximum hours of labor to a part of the producers and the miners

—namely, 'the producers of more than two-thirds of the annual national tonnage production for the preceding calendar year' and 'more than one-half of the mine workers employed'; and to producers of more than two-thirds of the district annual tonnage during the preceding calendar year and a majority of the miners, there is delegated the power to fix minimum wages for the district or group of districts. The effect, in respect of wages and hours, is to subject the dissentient minority, either of producers or miners or both, to the will of the stated majority, since, by refusing to submit, the minority at once incurs the hazard of enforcement of the drastic compulsory provisions of the act to which we have referred. To 'accept,' in these circumstances, is not to exercise a choice, but to surrender to force." (page 310.)

Respecting the constitutionality of the provisions, the opinion stated as follows:

"And a statute which attempts to confer such power undertakes an intolerable and unconstitutional interference with personal liberty and private property. The delegation is so clearly arbitrary, and so clearly a denial of rights safeguarded by the due process clause of the Fifth Amendment, that it is unnecessary to do more than refer to decisions of this court which foreclose the question. *Schechter Corp. vs. United States,* 295 U. S., at p. 537; *Eubank vs. Richmond,* 226 U. S. 137, 143; *Seattle Trust Co. vs. Roberge,* 278 U. S. 116, 121-122." (pages 311-312.)

In a separate opinion rendered by Chief Justice Hughes, the following was stated with respect to the constitutionality of the labor provisions of the Act:

"The provision permits a group of producers and employees, according to their own views of expediency, to make rules as to hours and wages for other producers and employees who were not parties to the agreement. Such a provision, apart from the mere question of the delegation of legislative power, is not in accord with the requirement of due process of law which under the Fifth Amendment dominates the regulations which Congress may impose."

Section 9 (b) is as follows:

"The Board shall decide in each case whether, in order to insure to employees the full benefit of their right to self-organization and to collective bargaining, and otherwise to effectuate the policies of this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof."

A clearer indication of purely arbitrary power is difficult to conceive. Illustrations of the possibilities in this regard with their far-reaching consequences on the rights of dissentient minorities, will readily suggest themselves without the necessity of detailed comment. Whether the revisory jurisdiction of the courts extends to the arbitrary discretionary powers exercised by the administrative body, is extremely doubtful under the Act's terms. As the question thus suggested is not germane to the issue here presented, it need not be further considered.

Section 9 (c) is as follows:

"Whenever a question affecting commerce arises concerning the representation of employees, the Board may investigate such controversy and certify to the parties, in writing, the name or names of the representatives

that have been designated or selected. In any such investigation, the Board shall provide for an appropriate hearing upon due notice, either in conjunction with a proceeding under section 10 or otherwise, and may take a secret ballot of employees, or utilize any other suitable method to ascertin* such representatives."

The words "utilize any other suitable method" provide a further illustration of the unlawful delegation of legislative authority without restriction on the discretionary power conferred. When it is considered that the representatives certified by the Board are the only parties with whom the employer may negotiate, under the Act's terms, the effect of the quoted language is susceptible of but one interpretation. This is particularly true when these words are read in the light of the legislative scheme considered as a whole.

Sub-paragraph (d) provides in substance, a record of the proceedings had under the last preceding subdivision shall be incorporated in the record submitted to the court, where an order of the Board is sought to be enforced.

Section 10 (a) provides as follows:

"The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice affecting commerce. This power shall be exclusive, and shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, code, law, or otherwise."

A literal interpretation of the exclusive power thus assumed to be created would seem to lead irresistibly to the conclusion that power was intended to transcend all legal limitations.

*So in original.

Sub-section (b) provides for the hearing by the Board on charges made before it, with the qualification that the "rules of evidence prevailing in courts of law or equity shall not be controlling."

Sub-section (c) regulates the taking and preserving of the testimony on any such hearing, as well as the requirement of findings of fact. In the event the charges are sustained, provision is made for the issuance by the Board of a cease and desist order. Incidental to the latter the Board is authorized "to take such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of this Act." No more arbitrary authority could be conferred on an administrative body, lacking any prescribed standards by which its action is to be governed, other than that of its own conceptions of the proprieties of a given situation. The effect of the action contemplated in the language quoted cannot be otherwise than to inject the element of force, foment trouble, destroy discipline and otherwise seriously affect the morale of any industry. The further effect, as an unconstitutional delegation of judicial power, will be considered later in the present brief.

Sub-paragraphs (d), (e), (f) and (g) cover the provisions for review by the courts. Incidentally it is provided that in any review of the Board's orders, "the findings of the Board as to the facts, if supported by evidence, shall be conclusive." Whether the qualification last quoted was intended to impair the authority and jurisdiction of the courts, need not be here considered.

Sub-paragraph (h) provides as follows:

> "When granting appropriate temporary relief or a restraining order, or making and entering a decree enforcing, modifying, and enforcing as so modified or set-

ting aside in whole or in part an order of the Board, as provided in this section, the jurisdiction of courts sitting in equity shall not be limited by the provisions of the Act of March 23, 1932."

This language was evidently included as an extra precaution against the possibility the Norris-LaGuardia Act might work both ways as a limitation on Federal jurisdiction.

Section 11 prescribes further details with respect to hearings conducted before the Board, including the right to examine all records of any industry against which charges are filed; the subpoenaing of witnesses, administration of oaths, the venue of such hearings, coupled with others conferring jurisdiction on the courts to require the presence of witnesses and their testimony before the Board with authorization of the power of punishment for contempt. These, and other details of like character need not be considered.

Section 12 provides for the punishment of any person interfering with the exercise by the Board, or any of its representatives, of the authority conferred by the Act's terms.

Section 13 is as follows:

"Nothing in this Act shall be construed so as to interfere with or impede or diminish in any way the right to strike."

Section 14 preserves the provisions of Section 7 (a) of the National Industrial Recovery Act; of Section 77B of the Bankruptcy Act and Public Resolution No. 44, in so far as the subject-matter of those several enactments are not covered by the present Act. Section 15 contains in usual form the severability clause.

The foregoing detailed review will serve the dual purpose of demonstrating not only the necessary effect of the statute in active administration, but also that its provisions

must be construed as contemplating the establishment of a complete code, all of the terms of which are essential and indispensable to the prescribed scheme. Apart from the special features already alluded to manifesting the oppressive, unreasonable and unfair impositions on employers, the subject may be approached from a broader angle. One condition of the Act stands out so conspicuously as to leave little room for doubt as to its single aim. It will be noted that while the most stringent regulations and obligations are imposed on employers (these last detailed under the caption of "unfair labor practice"), there is not in the Act's terms, from beginning to end, any corresponding regulation or limitation on the privileges of labor organizations. While employers are thus fettered and restrained by these most stringent and drastic limitations on the freedom of their conduct, the Act can be searched in vain for anything imposing any corresponding limitations on labor organizations. It will be observed that the most innocent violations of the Act's terms by employers may be made the subject of dictatorial proceedings and domineering exactments. On the other hand, the labor organizations are left free to have recourse to the whole category of customary coercive measures, directed, not alone at the industry, but also against the unorganized body of the employees. Equally conspicuous is the failure of the Act to invest in the Labor Board any jurisdiction to deal with matters of the character of those last indicated.

Finally, as the grand climax we find the provisions of Section 13 expressly reserving the right of employees to strike. Seemingly nothing further is required to demonstrate the Act's unconstitutionality.

V.

The Act Is Violative of the Provisions of Article 3, Section 1, and to the Seventh Amendment of the Constitution.

The subjects thus referred to are so far obvious from the framework of the Act and the necessary consequences in its operation as to require relatively brief consideration. That the Labor Board is a quasi-judicial tribunal, is hardly open to argument. That its functions exceed those ordinarily vested in a fact finding agency, is apparent. As respects the rights specifically granted, of ordering the reinstatement of discharged employees with or without back pay, the powers exercised are not essentially different from those of a court of equity in granting mandatory injunctions. The terms of the Act (Section 10 (a)), conferring exclusive jurisdiction on the Board could hardly be expressed in broader or more sweeping terms. The language employed is at least suggestive, if not indicative of a limitation on the power and authority of the courts. When added to this the further provisions excluding the necessity of observing the ordinary rules of evidence, and those prescribing finality to the findings of the Board supported by evidence, are considered, the attempted investiture of judicial power would seem complete.

The authorization of the reinstatement of discharged employees with allowances of back pay, clearly contemplate the exercise of judicial functions of purely common law character. The right of discharge is a common law right even where restricted by contractual undertakings subject, of course, to the ordinary common law consequences of liability in damages for breach of contract. The requirement of compulsory acceptance of undesired service transcends

one of the most elementary principles of equitable jurisdiction. The imposition of obligation for back pay (the far-reaching consequences of which in particular situations might prove disastrous), concludes an issue of common law cognizance without the right of jury trial prescribed by the Seventh Amendment.

VI.

The Severability Clause of the Act Is Ineffective in the Conditions Presented.

The subject thus indicated presents different aspects according as it is approached from the standpoint of the Act as a whole or from that of its special provisions. In the earlier discussion in this brief the Act in its broader features, taken as an entirety, was considered from the standpoints (a) of attempted regimentation of the industry of the country as a whole and (b) as an experiment in social economics. On either of the theories thus propounded it is clear the functions of the severability clause would be without avail.

Carter vs. Carter Coal Co., supra.

Compare: *The Employer's Liability Cases,* 207 U. S. 463.

It will doubtless be contended, however, that from the circumstance the Act has transcended in certain respects, the constitutional authority of Congress, it does not necessarily follow that it may not be sustained within the limits of that authority. This necessarily invokes the principle decided by the Carter case, *supra,* in which the criterion was thus succinctly stated:

> "Under the statutory rule, the presumption must be overcome by considerations which establish 'the clear

probability that the invalid part being eliminated the legislature would not have been satisfied with what remains.' *Williams vs. Standard Oil Co.*, 278 U. S. 235, 241, *et seq.*, * * *." (page 312.)

In considering this phase of the case many of the features already presented have appropriate bearing. These apart, however, in applying the criterion the question immediately propounds itself whether Congress would have enacted the statute in question but for the assumption of its applicability to industry in general. In this connection when it is recalled that the field of interstate commerce proper had largely been covered by earlier legislation, of which the Transportation Act, the Employer's Liability Act and the Longshoremen's Compensation Act are illustrative, it will be apparent there was relatively little left for Congressional regulation. If, however, the matter be resolved otherwise than as last suggested, the propriety of the terms of the Act from the standpoint of what for brevity may be termed as an exercise of the power of police, remains. It cannot be logically contended that the mandates of the Act in so far as they prescribe the rights and obligations of employers and employees and provide an administrative system for their enforcement can be segregated without destroying the foundation upon which the entire superstructure is rested. These last are the very crux of the entire legislative scheme. They constitute a code, each provision of which is indispensable to the code in its entirety. Remove the unconstitutional features and nothing of substance remains. For these reasons the severability feature of the Act is unavailing to save it from the consequences of its unconstitutionality.

CONCLUSION

Inherent in the subjects reviewed in the argument thus submitted are others of broader and deeper significance in their bearing on our existing constitutional system. It is confidently believed these will immediately suggest themselves without the necessity of detailed comment. The Act here considered cannot stand the test of constitutional principles so long established as not to be now open to doubt or controversy. It should be held unconstitutional accordingly.

Respectfully submitted,

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